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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

Rokt Corp.,)
Plaintiff,) Case No.: **CV 19-11158**
vs.)
Laura B. Zuchowski, in her official capacity,)
Director of USCIS Vermont Service Center;)
Kenneth T. Cuccinelli II, in his official)
capacity, Acting Director of United States)
Citizenship and Immigration Services;)
Chad Wolf, in his official capacity, Acting)
Secretary of Department of Homeland)
Security;)
United States Citizenship and Immigration)
Services; and)
Department of Homeland Security,)
Defendants)
)

I. INTRODUCTION

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3 1. Plaintiff Rokt Corp. is a global leader in marketing technology that provides tools
4 and services to major international clients such as eBay, Apple, Ticketmaster, and Virgin.
5 Plaintiff seeks to employ a Strategic Account Manager and has therefore filed a Petition for
6 H-1B Visa Classification, which would allow the Plaintiff to retain the services of a highly
7 qualified foreign employee. The United States Citizenship and Immigration Services ("USCIS")
8 has wrongfully denied this Petition.
9

10 2. This action seeks declaratory and injunctive relief against Laura B.
11 ZUCHOWSKI, Director of the Vermont Service Center, USCIS, U.S. Department of Homeland
12 Security ("DHS"); Kenneth T. CUCCINELLI II, Acting Director, USCIS; Chad WOLF, Acting
13 Secretary, DHS; USCIS, and DHS (collectively "the Government") under the Administrative
14 Procedure Act ("APA"), 5 U.S.C. §702, based on the Government's improper denial of a 1-129
15 Petition for H-1B Classification for a Nonimmigrant Worker (the "Petition") filed by Plaintiff
16 ROKT CORP ("Rokt") on behalf of prospective employee Nao Kobayashi (the "Employee-
17 Beneficiary") whom Rokt sought to employ in the position of Strategic Account Manager.
18

19 3. This is an action brought pursuant to Section 10b of the Administrative Procedure
20 Act 5 U.S.C. § 702, et. seq., seeking to hold unlawful and set aside the October 4, 2019 decision
21 by the Director of the Vermont Service Center denying the Petition for H-1B Classification filed
22 by Rokt on behalf of the Employee-Beneficiary.
23

24 4. The Petition was denied on the sole ground that the position offered to the
25 Employee-Beneficiary did not qualify as a so called "Specialty Occupation". The denial is
26 contrary to established legal precedent as well as to USCIS's own policy and is not supported by

1 the record and therefore arbitrary, capricious, and an abuse of discretion. Hence, the Plaintiff
2 requests that the Court hold unlawful and set aside the October 4, 2019 decision.
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II. PLAINTIFF

5 5. Plaintiff Rokt Corp. is a Delaware corporation with its principal place of business
6 in New York, NY. It provides tools and services to some of the biggest eCommerce companies
7 in the world, including eBay, Apple, Ticketmaster, and Virgin. The company's worldwide
8 operations include some 170 employees, including about 70 employees in the U.S. In 2018, it
9 generated revenues of close to \$80 million.
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III. DEFENDANTS

14 6. Defendant Laura B. Zuchowski is the Director of the Vermont Service Center of
15 USCIS and in that capacity she signed the aforementioned denial of the Petition.
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7. Defendant Kenneth T. Cuccinelli II is the Director of USCIS and he is responsible
18 for USCIS's policies, practices, and procedures and oversees the USCIS officer responsible for
19 making the decisions at issue in this case.
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8. Defendant Chad Wolf is the Secretary of the Department of Homeland Security
22 (DHS), the federal agency encompassing USCIS, which is responsible for administration and
23 enforcement of the immigration and nationality laws of the United States.
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9. Defendant U.S. Citizenship and Immigration Services ("USCIS") is an agency of
the Department of Homeland Security ("DHS") and is responsible for overseeing the
26 adjudication of immigration benefits.
27

1 10. Defendant U.S. Department of Homeland Security (DHS) is a cabinet department
2 of the U.S. federal government responsible for immigration-related services, enforcement, and
3 investigations. DHS oversees USCIS and its implementation of federal law.

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5 **IV. JURISDICTION & VENUE**

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7 11. This case arises under the Immigration and Nationality Act (INA), 8 U.S.C.
8 §1101 *et seq.* and the Administrative Procedure Act (APA), 5 U.S.C. §701 *et seq.* This Court has
9 federal question jurisdiction pursuant to 28 U.S.C. § 1331, as a civil action arising under the laws
10 of the United States. This Court also has authority to grant declaratory relief under 28 U.S.C.
11 §§2201-02, and injunctive relief under 5 U.S.C. §702, and 28 U.S.C. §§ 1361-62.

12

13 12. Venue is proper with this Court pursuant to 28 U.S.C. §1331(e) because this is a
14 civil action in which the Defendants are employees or officers of the United States, acting in
15 their official capacity, and agencies of the United States and because the Plaintiff resides in this
16 district and no real property is involved in this action.

17

18 13. Plaintiff may seek judicial review upon denial of the visa petition without any
19 further administrative appeal. See, e.g., EG Enters. v. DHS, 467 F. Supp. 2d 728, 732-33 (E.D.
20 Mich. 2006) (H-1B petition denial; USCIS agreed in its crossmotion that exhaustion not
21 required); RCM Technologies, Inc. v. US. Dept. of Homeland Sec., 614 F. Supp. 2d 39, 45
22 (D.D.C. 2009) (“[P]laintiffs need not pursue an AAO appeal before seeking judicial review of
23 denied visa applications in federal court.”).

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V. FACTUAL BACKGROUND & CASE HISTORY

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2 14. On April 4, 2019, the Plaintiff filed an I-129 Petition for a Nonimmigrant Worker
3 (case number EAC1917450604) asking that the Beneficiary Ms. Nao Kobayashi, a citizen of
4 Japan, be classified as a specialty occupation worker pursuant to Section 101(a)(15)(H)(i)(b) [8
5 USC 1101] of the Immigration and Nationality Act (“INA”), which would allow her to work in
6 the U.S. and to obtain an H-1B visa.
7

8 15. In its Petition, the Plaintiff demonstrated that it wanted to employ the Beneficiary
9 as a “Strategic Account Manager”. As required by law, enclosed to the Petition was a certified
10 Labor Condition Application for Nonimmigrant Workers issued by the Department of Labor
11 (“DOL”). In this Labor Condition Application Plaintiff determined that the job description of
12 “Strategic Account Manager” was most closely aligned with the job description of “Market
13 Research Analysts and Marketing Specialists” as outlined in the DOL’s “Standard Occupational
14 Classification” (“SOC”). Plaintiff chose therefore SOC Code 13-1161 for “Market Research
15 Analysts and Marketing Specialists” when submitting its Labor Condition Application.
16

17 16. In a support letter submitted with the Petition, Plaintiff included the following
18 task list for the position:
19

20 – Master the functionality of the Rokt platform and utilize the insights and data to
21 quantifiably optimize campaigns across the portfolio to deliver on individual and
client Key Performance Indicators (KPIs);
22 – Uncover marketing goals and identify relevant Rokt Solutions for leading Global,
National, and Regional businesses in collaboration with the General Manager of
23 Japan, Business Development Manager in Japan, and the New York-based account
management team;
24 – Build and create robust quarterly account reviews;
25 – Run Tableau analysis on data to create key insight reports, which includes
optimization areas for improvement on metrics such as engagement rate, conversion
26 rate, ROI, and payback;

- Create and manage an effective team relationship between all relevant stakeholders in Japan and the US;
- Analyze data through online tools such as Salesforce and Hubspot and analytics platforms such as Tableau to create strategy to support the broader team in new business growth and the ownership of client strategy and ongoing strategic account recommendations to drive client return;
- Perform tactical account planning and relationship building;
- Develop relevant marketing reports and client-facing account proposals with the support of cross-functional teams;
- Build and maintain strong direct client relationships and relationships with designated media agencies;
- Perform monthly and quarterly revenue forecasting and account plans.

17. In its support letter, the Plaintiff pointed out that according to the DOL's
10 Occupational Outlook Handbook (OOH) a position matching SOC Code 13-1161 (Market
11 Research Analysts and Marketing Specialists) needs at a minimum an undergraduate degree in a
12 specific field. The Plaintiff enclosed printouts from the OOH, including one that is titled "How
13 to Become a Market Research Analyst", which reads in part as follows:

15 Market research analysts typically need a bachelor's degree in
16 market research or a related field. Many have degrees in fields such
17 as statistics, math, or computer science. Others have backgrounds in
business administration, the social sciences, or communications.
18 Courses in statistics, research methods, and marketing are essential
for these workers.

19 Courses in communications and social sciences, such as economics
20 or consumer behavior, are also important.

21 Some market research analyst jobs require a master's degree.
22 Several schools offer graduate programs in marketing research, but
23 many analysts complete degrees in other fields, such as statistics and
marketing, and/or earn a master's degree in business administration
(MBA). A master's degree is often required for leadership positions
24 or positions that perform more technical research.

1 18. On June 27, 2019 USCIS issued a Request for Evidence (“RFE”) stating that the
2 Plaintiff’s initial filing had failed to establish that the position offered to the Employee-
3 Beneficiary met the requirements of a “specialty occupation” as defined by law.

4 19. On September 20, 2019, the Plaintiff filed a timely response to the RFE providing
5 additional documentation that demonstrated that the offered position did indeed meet the
6 requirements of a “specialty occupation”. Through Counsel, Plaintiff emphasized and
7 documented that (a) a degree in a specific field is normally the minimum requirement pursuant to
8 the OOH, that (b) the degree requirement is common to the industry according to two well-
9 established experts, that (c) the Plaintiff normally requires a specific undergraduate degree as a
10 minimum requirement for the position, and that (d) the position is highly complex and therefore
11 requires at a minimum a degree in a specific field.

13 20. On October 4, 2019, USCIS issued a decision denying the Plaintiff’s I-129
14 Petition for a Nonimmigrant worker. The decision indicated that the Plaintiff had failed to
15 establish that the position offered to the Employee-Beneficiary meets the requirements of a
16 “specialty occupation”.

18 **VI. LEGAL BACKGROUND**

20 21. The sole legal issue here is whether the position offered by the Plaintiff to the
Employee-Beneficiary meets the legal requirement of a “specialty occupation”.

22 23. The INA defines “specialty occupation” as an occupation that requires
“theoretical and practical application of a body of highly specialized knowledge” and
“attainment of a bachelor’s or higher degree in a specific specialty (or its equivalent) as a
24 minimum for entry into the occupation in the United States.” INA §214(i)(1) [8 USC §1184(i)(1)]
25
26

23. The regulations implementing the INA determine that a position needs to meet just one of the following four criteria to qualify as a “specialty occupation”.

(1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;

(2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;

(3) The employer normally requires a degree or its equivalent-for the position; or

(4) The nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

8 C.F.R. § 214.2(h)(4)(iii)(A).

24. USCIS wrongfully concluded that Plaintiff did not establish a single one of these criteria when denying the Petition.

25. Indeed, a correct reading of the facts and of the law establishes that the Petitioner meets at least one and most likely even two or three of the criteria as per 8 C.F.R. § 214.2(h)(4)(iii)(A).

VII. COUNT ONE

VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT

5 U.S.C. 701, ET SEQ.

26. Plaintiff re-alleges and incorporates herein by reference, as if fully set forth herein, the allegations in paragraphs 1–25.

27. The Administrative Procedure Act requires this Court to hold unlawful and set aside any agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

28. The October 4, 2019 decision by USCIS denying Plaintiff's Petition was arbitrary, capricious, an abuse of discretion, and not in accordance with law.

29. As discussed above, Plaintiff needs to demonstrate by a preponderance of the evidence that just one of the four criteria listed in 8 C.F.R. §214.2(h)(4)(iii)(A) is met in order to establish that a position is a “specialty occupation.”

30. USCIS acted arbitrarily and capriciously in finding that the current position offered to the Employee-Beneficiary did not meet the first of the four criterion specified above, namely that “a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.”

31. In its decision, USCIS relied on the DOL's Occupational Outlook Handbook, which it quotes as follows: "Market research analysts typically need a bachelor's degree in market research or a related field. Many have degrees in fields such as statistics, math, or computer

1 science. Others have backgrounds in business administration, the social sciences, or
2 communications.”

3
4 32. Because the OOH refers to different educational backgrounds that a successful
5 job applicant in the field may have and that may be an acceptable entry level education for a job
6 with a U.S. employer USCIS mistakenly concludes that the OOH “does not indicate that Market
7 Research Analyst positions normally require a minimum of a bachelor's degree in a specific
8 specialty.”

9
10 33. It appears to be USCIS’s interpretation that only positions that require graduation
11 from a singular specific degree program may be considered “specialty occupations”. Any job
12 where a U.S. employer may accept candidates with various academic degrees, so the USCIS
13 conclusion, ought not to be considered “specialty occupations”, no matter how closely related
14 these academic programs are.

15
16 34. This interpretation of the law, however, is contradicted by the plain language of
17 the statute, by precedent, and by USCIS’s own past understanding of its own regulations. It
18 would also make very little sense in a world where technology is constantly changing
19 professions, make old professions disappear, and creates new professions at a rapid pace.

20
21 35. As we explained above, the INA requires the “attainment of a bachelor’s or
22 higher degree in a specific specialty (or its equivalent) as a minimum for entry into the
23 occupation in the United States” in order to qualify a position as “specialty occupation”. INA
24 §214(i)(1) [emphasis added]. Congress explicitly drafted the statute broadly including both jobs
25 that require either a specific degree or its equivalent. The language of the statute therefore itself
26 emphasizes that a specific degree may not be the only path to a “specialty occupation”.

1 Congress therefore clearly did not ask for a narrow reading of the statute. USCIS's interpretation
 2 of the statute that allows only for positions that require a singular specific academic degree to be
 3 considered "specialty occupations" is quite obviously not covered by Congress's intent and
 4 therefore arbitrary and capricious. By explicitly stating that the "equivalent" of a particular
 5 degree will suffice Congress clearly wanted to open up the field of "specialty occupations"
 6 acknowledging that there are a number of highly complex professions where graduates with
 7 different, albeit normally related degrees may successfully enter the field.

8 36. In accordance with that reading of the statute, courts have made it clear that a
 9 proper interpretation of the law does not allow to narrow down the list of eligible positions to
 10 those that allow only a single specific academic background as entry requirement. We refer here
 11 to *Raj & Co. v. USCIS* (85 F. Supp. 3d 1241 (W.D. Wash. 2015), which while not in the same
 12 jurisdiction as this Court illustrates the issue beautifully.

14 37. The court in *Raj & Co.* concluded that H-1B classification for the position of
 15 "Marketing Analyst & Specialist", which is the same SOC category as selected for the position
 16 in Plaintiff's Petition, cannot be excluded just because the OOH allows for different educational
 17 backgrounds as entry level requirements.

19 38. Furthermore, the court in *Raj & Co.* wrote:

20 [USCIS]'s approach impermissibly narrows the plain language of the
 21 statute. The first regulatory criterion does not restrict qualifying occupations
 22 to those for which there exists a single, specifically tailored and titled degree
 23 program. Indeed, such an interpretation ignores the statutory and regulatory
 24 allowance for occupations that require the attainment of the "equivalent" of
 25 specialized bachelor's degree as a threshold for entry. 8 C.F.R. §
 26 214.2(h)(4)(ii) ; 8 U.S.C. § 1184(i). By including this language, Congress
 and the INA recognized that the needs of a specialty occupation can be met
 even where a specifically tailored baccalaureate program is not typically
 available for a given field."

1 39. The court in *Raj & Co.* followed other precedent, in particular *Tapis Intern. v.*
 2 *I.N.S.*, 94 F.Supp.2d 172 (D. Mass., 2000), which stated in no uncertain terms:

3 For the "equivalent" language to have any reasonable meaning, it
 4 must encompass not only skill, knowledge, work experience, or
 5 training, see e.g., *Augat, Inc. v. Tabor*, 719 F.Supp. 1158, 1160-61
 6 (D.Mass.1989) (finding occupation a "profession" under prior
 7 regulatory framework where alien had no bachelor's degree), but
 8 also various combinations of academic and experience based
 9 training. It defies logic to read the bachelor's requirement of
 10 "specialty occupation" to include only those positions where a
 11 specific bachelor's degree is offered. In fields where no specifically
 12 tailored baccalaureate program exists, the only possible way to
 13 achieve something equivalent is by studying a related field (or
 14 fields) and then obtaining specialized experience. By including the
 15 "or its equivalent" language, the statute and regulations recognize
 16 that the needs of a specialty occupation can be met through
 17 education, experience, or some combination of the two.

18 40. More recently, the court in *Relx, Inc. v. Baran* (D. D.C., 2019) also strongly
 19 rejected the notion of one single academic path to a "specialty occupation":

20 This position is untenable. There is no requirement in the statute that
 21 only one type of degree be accepted for a position to be specialized.
 22 The statute and regulations simply require that a "position actually
 23 requires the theoretical and practical application of a body of highly
 24 specialized knowledge, and the attainment of a bachelor's or higher
 25 degree in the specific specialty [is a] minimum requirement for entry
 26 into the occupation." [...] In other words, if the position requires the
 27 beneficiary to apply practical and theoretical specialized knowledge
 28 and a higher education degree it meets the requirements. Nowhere
 29 in the statute does it require the degree to come solely from one
 30 particular academic discipline. [p. 27]

31 41. USCIS's interpretation that only jobs that have an exclusive academic education
 32 requirement may be considered "specialty occupations" also clearly contradicts previous

1 USCIS's statements. For illustration, we are referring here to a decision by the USCIS
 2 Administrative Appeals Office (*Matter of F-C-U-, Inc.*, ID# 14666 (AAO Dec. 9, 2015)):

3 Contrary to the Petitioner's assertion that we "[dismiss] the idea that
 4 an occupation could be a specialty occupation when a degree from
 5 more than one field of study meets the minimum educational
 6 requirements," we acknowledge that a position may qualify as a
7 specialty occupation if it permits, as a minimum entry requirement,
8 degrees in more than one directly related specialty. See section
 9 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). This also includes
 10 even seemingly disparate specialties, provided, again, that the
 11 Petitioner establishes how each acceptable, specific field of study is
 12 directly related to the duties and responsibilities of the particular
 13 position. See *Royal Siam Corp. v. Chertoff*, 484 F.3d at 147
 14 (describing "a degree requirement in a specific specialty" as "one
 15 that relates directly to the duties and responsibilities of a particular
 16 position"). [emphasis added]

17 42. If USCIS now determines that the position it took in the above-referenced AAO
 18 decision is no longer tenable it must go through the proper rule making channels pursuant to
 19 Section 553 of the APA in order to establish a completely new interpretation of the statute. It is
 20 widely accepted that in executing a significant policy change or other reversal an agency is
 21 required to comply with applicable APA procedural requirements. *See Perez v. Mortg. Bankers*
 22 *Ass'n*, 575 U.S. ___, 135 S. Ct. 1199, 1206 (2015) (holding that the APA "mandate[s] that
 23 agencies use the same procedures when they amend or repeal a rule as they used to issue the rule
 24 in the first instance."). A clandestine change of the interpretation of a significant part of the
 25 statute, however, is arbitrary and capricious and cannot be tolerated by a court of law.

26 43. Finally, USCIS's interpretation of the statute also does not hold up in a "real
 27 world test". The enormous speed of technological development over the last 25 years has
 28 brought job after job to the surface for which there is not yet a clearly defined academic path. A

1 lot of these jobs are highly complex and should therefore without a doubt be considered specialty
2 occupations. To refuse the “specialty occupation” classification only because of the lack of a
3 single academic trajectory to such a job would make very little sense and was obviously not the
4 intent of Congress.

5

6 **VIII. COUNT TWO**

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8 **VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT**

9 **5 U.S.C. 701, ET SEQ.**

10 44. Plaintiff re-alleges and incorporates herein by reference, as if fully set forth
11 herein, the allegations in paragraphs 1–43.

12 45. The second of the four 8 C.F.R. §214.2(h)(4)(iii)(A) grounds is that the “degree
13 requirement is common to the industry in parallel positions among similar organizations or, in
14 the alternative, an employer may show that its particular position is so complex or unique that it
15 can be performed only by an individual with a degree.”

16 46. USCIS acted arbitrarily and capriciously in finding that the Plaintiff did not
17 demonstrate that a degree requirement is common to the industry, namely by disregarding the
18 testimony of two well established experts without providing clear criteria when and under what
19 conditions such testimony would be acceptable. In effect, and for all practical purposes,
20 Defendants completely ignored this highly probative and dispositive evidence.

21 47. To establish that a degree is a requirement common to the industry Plaintiff
22 provided testimony by two well-regarded experts:

1 48. Dr. Al Kamienski is a professor of Finance, Economics, Accounting, Strategic
2 Management, and Business Communications at North Park University. In addition to his
3 extensive teaching experience, Dr. Kamienski has provided strategic consulting on management
4 and business development for over two decades. In his work with organizations ranging from
5 large corporations to non-profits, he has consulted on marketing strategy to fulfill many types of
6 needs, and is well versed on the marketing landscape. Dr. Kamienski's experience in the field
7 clearly qualifies him to discuss the industry standard of requiring Strategic Account Managers
8 (and those in similar roles) to have bachelor's degrees in marketing or a related field. As a part of
9 his research to support the claim that requiring a degree in Marketing or a related field is
10 common to similar positions in the industry, he has consulted with recruiters in the field.
11

12 49. Professor Robert Bohn is a professor of Marketing as well as a senior
13 communications and marketing executive with more than 30 years of teaching, management, and
14 consulting experience. He has directed marketing services for well-known organizations such as
15 The Leukemia & Lymphoma Society, ESPN, Forbes, and Time Magazine. He has also taught
16 marketing courses at New York University, the Fashion Institute of Technology, and Fordham
17 University.
18

19 50. The Plaintiff provided to USCIS extensive background materials regarding the
20 two experts, including letters of recommendations and *curricula vitae*. As outlined above, the
21 materials reflect that the two experts do not only have stellar academic credentials but extensive
22 experience in the business world.
23

24 51. Both experts concluded that the position of Strategic Account Manager as
25 described by the Plaintiff in its I-129 Petition requires at a minimum an undergraduate degree in
26 Marketing or a related field and that such a degree requirement would be common to the

1 industry. Dr. Kamienski wrote "Given the analytical, technical, and quantitative complexity in
2 the subject role of Strategic Account Manager with Rokt, it is typical for employers of such
3 individuals to require that professionals working in such quantitative positions have at least a
4 bachelor's degree in Marketing or a related field. Based both on my review of the aforesaid job
5 duties and my extensive background in academia, consulting and observations of the job
6 placement patterns of graduating students, I believe that the stated requirements for the position
7 are fair, reasonable, and necessary." And Dr. Bohn added: Indeed, it is common for companies
8 such as Rokt to require [an undergraduate degree in marketing or a related field] for a candidate
9 in similar positions throughout the industry."

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11 52. Nevertheless, and without exploring the issue in any detail USCIS claims that
12 "[t]he Professors' expertise, regarding current industry degree requirements for Strategic Account
13 Manager positions is not established in the record."

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15 53. With regards to the proffered expert testimony the October 4, 2019 USCIS
16 decision is full of vague and not entirely correct references such as "[b]ased on the
17 documentation provided, most of the Professors' experiences have been in an academic setting
18 within a university." *Inter alia*, it is not accurate to allege that the two experts lack any real world
19 professional experience. As we noted before and as it is well established in the record, the two
20 experts have both many years of industry experience. In any case, USCIS does not specify how
21 much industry experience would be necessary to meet the government's standards and to make
22 their testimony acceptable.

23
24 54. In order to justify its disregard for the proffered expert testimony, the USCIS
25 decision merely copies verbatim from a more than 30 year old administrative appeals decision
26 (*Matter of Caron International, Inc.*, 19 I&N Dec. 791 (Comm. 1988)), which states that the

1 government “may, in its discretion, use as advisory opinions statements from universities,
2 professional organizations, or other sources submitted in evidence as expert testimony. However,
3 where an opinion is not in accord with other information or is in any way questionable, USCIS is
4 not required to accept or may give less weight to that evidence.” USCIS does not elaborate in
5 any way, how this decision applies to Plaintiff’s Petition. It does not outline whether USCIS
6 concluded that the testimony is not in accord with other information in the record or what parts
7 of the testimony may be questionable. It also does not elaborate whether USCIS rejects the
8 testimony in its entirety or whether it just give it less weight.
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10 55. USCIS’s refusal to thoroughly review and discuss the submitted evidence with
11 regards to the expert testimony in any detail renders its decision arbitrary and capricious as it
12 does not allow the reader of the decision to ascertain whether USCIS followed a preponderance
13 of the evidence standard as required in most immigration proceedings. *U.S. v. Cardozo-Fonseca*,
14 480 U.S. 421 (1987)

15 56. USCIS disregards the proffered expertise without referring to a clear standard for
16 expert testimony and without identifying the source for such a standard. Disregarding the
17 testimony of expert witnesses without disclosing the applied standards of review is by definition
18 arbitrary and capricious and an abuse of discretion.
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IX. COUNT THREE

VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT

5 U.S.C. 701, ET SEQ.

57. Plaintiff re-alleges and incorporates herein by reference, as if fully set forth herein, the allegations in paragraphs 1-56.

58. The third of the four 8 C.F.R. §214.2(h)(4)(iii)(A) grounds is that the employer normally requires a degree or its equivalent for the position.

59. The Plaintiff submitted to the Government the names and information about the academic credentials of the nine most recent employees in the position of Strategic Account Manager and Account Manager; the latter being a similar albeit somewhat more junior position than the Strategic Account Manager. The Plaintiff also submitted CVs of the referenced employees as well as in most cases copies of their undergraduate diplomas.

60. The submitted information reflected that all the hires in the same or similar position as offered to the Employee-Beneficiary have at least an undergraduate degree, which is specific to the proffered position pursuant to the OOH.

61. Even though the submitted evidence clearly demonstrates that the Plaintiff routinely hires employee for these position that have at least an undergraduate degree that is specific pursuant to the OOH USCIS did not accept the proffered evidence as sufficient.

62. The regulations, as outlined above, require evidence that the employer “normally” hires employees with at least an undergraduate degree related to the position. USCIS has failed to explain why the information about the nine most recent hires is not sufficient and why more historical data is required.

1 63. The information about the nine most recent hires should clearly suffice to
2 demonstrate a pattern as required under the “normally” standard of the regulations. To disregard
3 this information is arbitrary and capricious and constitutes a clear abuse of discretion.

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6 64. For all these reasons, the denial of Plaintiff’s Petition violated applicable law and
7 regulations as well as USCIS’s own policy and was therefore arbitrary and capricious. This
8 Court should therefore hold unlawful and set aside USCIS’s October 4, 2019 decision.
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VIII. PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that this Court grant the following relief:

- (1) Assume jurisdiction over this matter;
- (2) Hold unlawful and set aside USCIS' s October 4, 2019 decision denying Plaintiffs I-129 Petition;
- (3) Order Defendants to approve Plaintiffs I-129 petition
- (4) Grant reasonable attorneys' fees and costs as provided under the Equal Access to Justice Act and the APA;
- (5) Grant such further relief as the Court deems just and proper.

Dated: December 4, 2019

/s/ Lorenz Wolffers

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